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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 137

GIRARD TRUST COMPANY, GEORGE STEVENSON, WILLIAM R. VERNER, et al., appellants

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION OF THE COURT BELOW

This case is reported in 59 Ct. Cls., at page 727. Memorandum opinion of the court is on page 9 of the record.

JURISDICTION

The appeal is under Section 242, Judicial Code. The judgment was entered May 19, 1924, and the appeal was allowed July 3, 1924. (R. 9.) The judgment dismissed the petition of the plaintiffs upon findings of fact made upon a stipulation of facts by the parties. (R. 4.)

STATEMENT

The claim as now presented demands payment of three amounts arising out of an adjustment by the Commissioner of Internal Revenue of two claims for refund, one being for the refund of excess-profits taxes for the year 1917, the other for refund of incomes taxes for the year 1920. Very briefly the claims may be stated as follows:

(*a*) *Claim for $767.79.*—Early in 1918 an excess-profits tax of $108,140.15 was assessed against the appellants. The tax was not due until June 15, 1918. The statute, Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, Section 1009, page 326, permitted a credit against taxes paid in advance calculated at the rate of 3 per cent per annum upon the amount so paid from the date of payment to the date fixed by law for payment. The amount of the discount because of this payment in advance was $767.79. The claim for refund was allowed for the entire amount paid, but not for the discount. The appellants now seek to recover the discount.

(*b*) *The claim for $2,028.11.*—The two claims for refund were, as claimed by the Government, "allowed" on December 9, 1922, and interest paid to that date. Appellants claim that in addition they were entitled to interest until dates of actual payment, which in this case were February 6, 1923, and February 20, 1923. The additional interest so computed would be $2,028.11. This contention involves a construction of Section 1324(a) of the

Revenue Act of November 23, 1921, c. 136, 42 Stat. 227, 316, which provides that upon the allowance of a claim for refund interest shall be paid " to the date of such allowance."

(c) *The claim for $3,889.67.*—This involves the construction of other provisions of the same Section 1324(a) of the Revenue Act of 1921, which requires interest to be paid, under certain circumstances, from the date when the tax was paid; under other circumstances, from six months after the date of filing of the claim for refund. The claim for refund of the 1920 taxes was filed on August 2, 1921, and in allowing the claim the Commissioner computed interest from February 2, 1922; that is, six months after the claim was filed.

Appellants claim that it should have been computed from the dates of payment of the tax.

If the contentions of the appellants are sound, the amount of additional interest which should have been paid is $3,889.67. This somewhat complicated situation will be made plain in the statement of facts to follow:

The Court of Claims found the facts but did not pass upon the appellants' contentions, holding that the principal sums and interest as allowed by the Commissioner " having been paid to and accepted by the plaintiffs, they can not maintain in this court an action against the Government for additional interest. See *Stewart* v. *Barnes,* 153 U. S. 456, 464."

STATUTES INVOLVED

Revenue Act of November 23, 1921, c. 136, 42 Stat. 227

Section 250 (b) provides (42 Stat. 264):

> (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, *the excess so paid shall be credited against the subsequent installments;* and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of Section 252. (Italics ours.)

Section 252 provides in part as follows (42 Stat. 268):

> SEC. 252. That if, upon examination of any return * * * it appears that an amount of income, war-profits or excess-profits tax has been *paid* in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: * * * (Italics ours.)

Section 1324 (a) provides (42 Stat. 316):

> SEC. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes *paid*, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month *to the date of such allowance*, as follows: (1) If such amount was paid under a *specific* protest setting forth in detail the basis of and *reasons* for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part. (Italics ours.)

Revenue Act of October 3, 1917, c. 63, 40 Stat. 300

Section 1009 provides in part as follows (40 Stat. 326):

> SEC. 1009. That the Secretary of the Treasury, under rules and regulations prescribed by him, shall permit *taxpayers liable to income and excess-profits taxes* to make payments in advance in installments or in whole of an amount not in excess of the estimated taxes which will be due from

them, and upon determination of the taxes actually due any amount paid in excess shall be refunded as taxes erroneously collected: *Provided,* That when payment is made in installments at least one-fourth of such estimated tax shall be paid before the expiration of thirty days after the close of the taxable year, at least an additional one-fourth within two months after the close of the taxable year, at least an additional one-fourth within four months after the close of the taxable year, and the remainder of the tax due on or before the time now fixed by law for such payment: *Provided further,* That the Secretary of the Treasury, under rules and regulations prescribed by him, may allow credit against such taxes so paid in advance of an amount not exceeding three per centum per annum calculated upon the amount so paid from the date of such payment to the date now fixed by law for such payment; *but no such credit shall be allowed on payments in excess of taxes determined to be due,* nor on payments made after the expiration of four and one-half months after the close of the taxable year. * * * (Italics ours.)

THE FACTS

The Girard Trust Company and the other appellants were trustees of the estate of Alfred F. Moore, deceased. (R. 4.)

The supposed excess-profits tax upon Moore's estate for 1917, as originally determined, amounted

to $108,140.15. On March 21, 1918, the trustees paid to the Collector of Internal Revenue $107,372.36, the amount of the tax less the credit of $767.79 allowed for payment in advance of the time fixed by law, June 15, 1918. (Finding II, R. 5.)

Being advised that trustees of a trust estate were not subject to excess-profits taxes, on August 2, 1921, they filed claim for refund of the entire tax of $108,140.15. Claim was allowed for $107,372.36, and on December 9, 1922, Schedule Form 7777, Serial No. 3781, including this item was "approved by the Commissioner of Internal Revenue for transmission to the proper accounting officer for credit and refund." On February 7, 1923, the plaintiffs received by mail a certificate of overassessment, dated February 6, 1923, for $107,372.36, together with a check for $112,864.53, the difference, $5,492.17 being interest on the amount refunded from the date six months after filing of the claim to the date of allowance. (Finding III, R. 5.)

The appellants claim that they should have received $108,140.15, with interest, hence the present claim for $767.79 and interest.

The proposed income tax upon the Moore estate for 1920, as originally returned early in 1921, was $196,202.61. On March 15, 1921, and on June 15, 1921, quarterly installments of such tax, each amounting to $49,050.66, were paid to the Collector.

There was attached to the original return of claimants the following protest:

> NOTE.—Profit was made during the year 1920 upon sales of capital assets as set forth in block C above. This amount of $349,200.85 is included in the total net income and under regulations is returned for tax on Form 1040. As the taxpayer is advised that such sum is not taxable income, under the decison of *Brewster* v. *Walsh*—District Court for District of Connecticut, made December 16, 1920—the report of the amount of such profit is made and tax paid thereon only under protest, and only in compliance with the requirement of the foregoing form and the instructions thereon.
>
> TRUSTEES ESTATE OF
> ALFRED F. MOORE, DEC'D.
> GEORGE STEVENSON, *Trustee.*
>
> MARCH 11, 1921.

Both the March 15 and June 15 installments were paid thereunder. The June 15 installment was also paid under the following additional notice, which was transmitted to the Collector with the check:

> In view of the joint investigation by accountants of both Government and trustees now in progress, with the agreed object of correcting certain figures, especially those relating to depreciation, believed to have been erroneously increased, as to the most important item and ignored as to another item, in the 1920 return of said trustees cov-

ering the sale of the three capital assets in that return set forth, estimating the total of said profits and the tax payable thereon out of the trust estate.

Inasmuch as a second quarterly installment of $49,050.60 based upon said estimate, is now (6-15-21) due, you are hereby notified that the accompanying payment thereof is made without prejudice to the right of said trust estate to be hereafter relieved from or reimbursed for the payment of any tax upon the profits so returned in excess of the total tax, resulting from such final adjustment thereof as may be determined, either by agreement, or by the courts.

On August 2, 1921, appellants filed claim for refund of the two installments aggregating $98,101.32 already paid, and claim for abatement of the two remaining quarterly installments not yet paid, aggregating $98,101.29. The claim for abatement was allowed in its entirety and the claim for refund in large part. Schedule Form 7777, Serial No. 3781, including this item, was on December 9, 1922, " approved by the Commissioner of Internal Revenue for transmission to the proper accounting officer for credit and refund." On February 20, 1923, plaintiffs received by mail a certificate of overassessment dated February 10, 1923, for $182,538.72. This certificate stated that since $196,202.61 was assessed, whereas $13,663.89 was the correct tax, there had been an overassessment of

$182,538.72, and that the amount of this overassessment had been applied as follows:

Amount abated	$98,101.29
Amount credited	21.41
Amount refunded	84,416.02

With this certificate was a check for $84,416.02, the amount of the refund without interest. (Finding V, R. 6. Since filing the petition plaintiffs have received under date of October 5, 1923, a communication and check for $4,318.97, interest on the refund of $84,416.02 and the credit of $21.41 from six months after filing of the claim for refund to December 9, 1922. Finding VI, R. 7.) This amount of interest, claimed in the petition, is therefore no longer in the case.

Findings VII, VIII, IX, X, and XI contain the stipulation of the parties with respect to the amount of interest to be allowed in case the various claims of the appellants are found to be sound as a matter of law.

CONTENTIONS OF UNITED STATES

1. **Claimants are entitled to interest on taxes refunded only "to the date of such allowance."**
2. **Appellants are not entitled to interest from dates of payment of the 1920 income tax (instead of from the date six months after filing of claim for refund), because their protest did not set forth in detail the basis of and reasons for such protest, within the meaning of the statute.**

3. Appellants were not entitled to refund of more than the amount actually paid by them. They can not recover, therefore, the sum of $767.79 discount upon the excess-profits tax for 1917.

4. This action is not maintainable because the appellants have accepted without objection the refunds and interest allowed by the Commissioner.

ARGUMENT

I

Claimants are entitled to interest on taxes refunded only "to the date of such allowance"

Under Section 1324(a), Revenue Act of 1921, hereinbefore set forth, upon the allowance of a claim for refund of or credit for taxes paid, interest shall be allowed to the date of "such allowance." The Treasury Department has held that a claim for refund or credit is "allowed" within the meaning of the statute when the Commissioner approves the schedule of refundable taxes in whole or in part for transmission to the proper accounting officer for credit or refund, and has embodied that ruling in Article 1040 of Regulation 62 (1922 Edition) which provides:

> A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for credit or refund.

The language of the statute seems to be plain, and under the finding of the Court of Claims it is not open to dispute that the claims for refund were allowed on December 9, 1922, that being the date upon which Schedule Form 7777, including these items, was "approved by the Commissioner of Internal Revenue for transmission to the proper accounting officer for credit or refund." (Finding III, R. 5; Finding V, R. 6.) Appellants contend, however, that the words, "date of allowance," mean date of payment. If Congress had intended to allow interest to the date of payment, it undoubtedly would have expressed such an intention in clear and unmistakable language.

The distinction between date of allowance and date of payment is obvious to any one familiar with the operations of the Treasury, and Congress, of course, had knowledge of those operations. The "allowance" of a claim by the Commissioner involves a consideration and determination of the merits of the claim, the interpretation of statutes and their application to the facts in each case, and finally adjudication by the Commissioner. If the decision is favorable to the taxpayer, it is an allowance of the claim, but the payment or credit of the claim is quite a different thing. Those are but ministerial acts. The claim is allowed by the Commissioner, but the payment is by a disbursing officer in due course.

This is the reasonable construction of the word "allowance" as used in the Act. In *United States*

v. *Kaufman*, 96 U. S. 567, this Court recognized the allowance of the claim as being a separate and distinct transaction from actual payment thereof.

In construing the phrase, "to the date of such allowance," as used in Section 1324(a), it was stated by the Comptroller General, 1 Decisions Compt. Gen. 411, 412, that—

> In view of this plain provision of the law it must be held that the date of allowance of the claim for refund or credit, and not the date of actual payment is the date to which interest will accrue. To compute interest to the date of actual payment would be wholly impracticable from an administrative standpoint, and I have no doubt that this phase of the matter was considered by the Congress in providing that the interest should be allowed to the date of allowance rather than to the date of payment of the claim.

This opinion of the Comptroller General upon the practical aspects of the case is entitled to great consideration.

In the present case the Commissioner allowed the claims for refund on December 9, 1922, by endorsement thereon:

> The several amounts herein noted as reduction of the tax liability are hereby approved and allowed. (Exhibit A opposite page 8 of the record.)

The right to refund or credit and the amount thereof was thus fixed and determined. By Sec-

tion 1313 of the Revenue Act of 1921, 42 Stat. 313, the merits of the claim were not thereafter subject to review by any other administrative officer of the United States. Thereafter it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit. This, of course, takes time if the interests of the Government are to be fully protected. Whichever it may be, the total of principal and interest received by the claimant is the same, and the date of the allowance of the claim, that is, the date of adjudication of his right to credit or refund, remains the date of the approval of the original schedule. When the award is thus made the taxpayer is entitled to the amount of the allowance less, of course, any sum due the Government by way of set-off. This does not in any way effect the original claim as allowed. If the collector reports that the taxpayer is indebted to the United States, this is checked against the amount allowed on the claim. The allowance made by the Commissioner, however, entitled the taxpayer to a payment in cash or to credit of the full amount, and it is upon this sum that interest is computed.

Appellants' interpretation of the Act, if followed, would be to pay interest *beyond,* instead of "*to* the date of such allowance." They are not entitled, therefore, to additional interest upon this theory. They have received the full amount, which the statute authorizes, and it can not be enlarged by indulging in a subtle construction of the Act

(compare *United States* v. *Sherman,* 98 U. S. 565, 567; *United States* v. *New York,* 160 U. S. 619), because unless the claim of interest against the Government is *clear and beyond question,* it must be denied. *District of Columbia* v. *Johnson,* 165 U. S. 330, 338.

The construction placed upon the Section by the Treasury for the past four years should, of course, be given great weight, especially since Congress in the Revenue Act of 1924, June 2, 1924, c. 234, sec. 1019, 43 Stat. 253, 346, continued to make interest upon a refund run to the date "of the allowance of the refund." *United States* v. *Hermanos y Compañia,* 209 U. S. 337, 339.

The case of *Blair* v. *United States ex rel. Birkenstock,* 6 Fed. Rep. (2d) 679, is cited by appellants as authority for their contention that the approval of the refunds by the Commissioner on December 9, 1922, does not constitute an "allowance" of the claims, and further, that the acceptance of a check issued to a taxpayer by a disbursing clerk does not bar an action for additional interest.

In that case the Commissioner, on May 19, 1924, allowed a reduction of tax liability and forwarded it to the collector for checking. This was returned by the collector on June 30, 1924. Between these dates and on June 2, 1924, the Revenue Act of 1924, 43 Stat. 352, became law, and specifically repealed Section 1324(a) of the Revenue Act of 1921. Therefore, the Court of Appeals of the District of Columbia held that on June 30, 1924, the Commissioner's sole authority to order the disbursing clerk

to pay interest upon refunds was derived from the Revenue Act of 1924. Consequently, the provisions of that Act were controlling, and the interest should have been computed accordingly. The Court said that their conclusion did not tend to invalidate the department's regulation that the term "allowance" when used to indicate the close of the interest period shall signify the date "when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund." It should be noted, too, that in that case the taxpayer at the time of receiving the check protested to the collector against the amount of interest allowed and demanded that it be computed under the Revenue Act of 1924. (NOTE.—That case is now pending before this Court upon a writ of *certiorari,* being number 713 upon the docket.)

II

Appellants are not entitled to interest from dates of payment of the 1920 income tax (instead of from the date six months after filing of claim for refund), because their protest did not set forth in detail the basis of and reasons for such protest within the meaning of the statute

Appellants claim recovery of additional interest of $3,889.67 for the taxes paid upon the income of the estate for the year 1920, as originally returned and assessed at $196,202.61. The basis of this claim is that the taxes covering one-half of that sum, or $98,101.32, were paid under a specific protest within the meaning of Section 1324 (a) (1), which, if proved, would have entitled appellants to interest

from the date of payment of the tax, instead of from a date commencing six months after the claim for refund thereof was filed, as provided in Section 1324 (a) (3). They have already received the amount refunded plus interest thereon computed under Section 1324 (a) (3). Therefore, they now claim interest under subdivision (1) on the total refund of this item for the interim between the date when the tax was paid and the date six months after the claim for refund was filed.

To itemize:

Amount of tax originally returned and assessed	$196,202.61	
March 15, 1921, payment of first quarterly installment thereon		$49,050.66
June 15, 1921, second quarterly installment paid		49,050.66
Amount remaining unpaid, and later abated		98,101.29
Total	196,202.61	196,202.61
August 2, 1921, claim for abatement thereon	98,101.29	
August 2, 1921, claim for refund of the two installments paid	98,101.32	
Total	196,202.61	
Amount of tax determined due after audit and determination of claim for abatement and refund		13,663.89
Allowances on claim:		
Credit on overpayment		21.41
Amount refunded		84,416.02
Amount abated		98,101.29
Total	196,202.61	196,202.61

(*Explanation.*—Appellants filed a claim for the refunding of the two installments of $49,050.66 each, paid on the 1920 tax of $196,202.61. The Commissioner determined that the correct amount of income tax due for that year was $13,663.89 instead of $196,202.61, thereby showing an over-assessment of $182,538.72. Since $98,101.32 had been paid and only $13,663.89 was due, $21.41 of the overpayment was applied as a credit on account of other taxes due from the claimants, $84,416.02 was refunded, and the balance of the original assessment remaining unpaid, $98,-101.29, was abated.

Interest on the refund of $84,416.02 and upon the credit of $21.41 was allowed, computed under Section 1324(a)(3) at the rate of one-half of one per cent per month from six months after the filing of the claim for refund, February 2, 1922, to the date of the allowance of the claim by the Commissioner, December 9, 1922.)

Appellants are now endeavoring to recover interest on the refund of $84,416.02 plus the credit of $21.41, total $84,437.43, from the dates of the payment of the respective installments, namely;

From March 15, 1921 (date of payment of first installment)	$45,634.68
From June 15, 1921 (date of payment of second installment)	38,802.75
Total	84,437.43

Based upon the assumption that the two installments were paid under specific protest, it is argued that the interest should have been computed under Section 1324(a) (1), Revenue Act of 1921, from the respective dates of the payments, after deducting $3,415.97, one-quarter of the correct amount of the tax due ($13,663.89) from the first payment made March 15, 1921, and on the second installment, from date of payment, less $10,247.92, three-

quarters of and the balance of the correct amount of the tax found due.

Section 1324(a) (1) provides that "if such amount was paid under a specific protest, setting forth in detail the basis of and the reasons for such protest," the interest shall be computed "from the time when such tax was paid."

Neither the notice dated March 11, 1921 (Finding IV, R. 5–6), nor the notice filed with the payment of June 15, 1921 (Finding IV, R. 6), constitute "a specific protest setting forth in detail the basis of and reasons for such protest," within the meaning of that Section.

The obvious intention of the statute in allowing interest from the time when the tax was paid, if it was paid under a specific protest setting forth in detail the basis of and reasons for such protest, was to afford the taxpayer a right to interest when, at the time he paid the tax, he pointed out specifically to the collector a valid reason why such tax was illegal in whole or in part. If, then and there, he gave a sound, valid reason such as entitled him to a return of his money, such as would assist the Commissioner in his audit of the return under Section 250(b), he became entitled to interest from that date, if subsequently, upon claim for refund, it appeared that he was right. Congress evidently intended to draw a distinction between protests based upon sound valid considerations and those filed merely upon general principles in the hope that some day and somehow the taxpayer might be

able to figure out that he had overpaid his tax. The taxpayer who did the former was to receive the benefit of interest from the date he pointed out to the collector good ground for recovery. The taxpayer who did merely the latter was to receive interest only from a date six months after the filing of claim for refund. If Congress did not intend to draw some such distinction, the discrimination of the statute becomes purposeless, and everybody would be entitled to interest from the date of payment if he gave some kind of a protest and assigned some reason, good, bad, or indifferent; whether made in good faith or not, and whether based upon substantial reasons or upon mere speculation and hope.

The protest filed in this case does not satisfy this construction of the statute. On March 15th he stated that he was advised that profit made from the sales of capital assets was not taxable income under the decision of *Brewster* v. *Walsh,* decided by the District Court of Connecticut on December 16, 1920. That decision was on March 28, 1921, reversed by this Court. *Walsh* v. *Brewster,* 255 U. S. 536. This reversal was more than two months before the payment of the June 15th installment. The further protest filed with the June 15th installment merely stated that an investigation of the accounts by the Government and trustees was now in progress for the purpose of correcting certain figures, and the collector was notified that the payment was made " without prejudice " to the right

of the trust estate to be relieved from or reimbursed for payment of tax upon certain profits resulting from the final adjustment of the tax. Certainly there was nothing in either of these notices which appraised the collector of the right of appellants to have any part of their tax returned. The specific ground mentioned in the first protest was wholly invalid, and that in the second notice was not even a protest and pointed out no reason whatever why the tax should not be paid. It was merely a reservation of the right to be reimbursed at some future time should some good ground for reimbursement be developed by an investigation which was then going on.

Appellants insist that the correct amount of the tax ($13,663.89) should be divided into quarters in determining the interest due upon the balance refunded. That is to say, one-quarter ($3,415.97) should be deducted from the amount of the installment paid March 15, 1921, and the balance ($10,247.92) deducted from the installment paid on June 15, 1921, interest to run on the balance left after such deductions from the respective dates of payment of the installments. Such is not the direction of the statute.

The statute (Section 250(b)) plainly directs that if the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount

of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of Section 252.

Claimants assume that the Commissioner did not recompute the correct amount of tax in four equal installments. It is immaterial under the circumstances of this case whether he did or not. There cannot be an iota of difference in the result, if the statute is complied with. For, whether the correct amount of tax is recomputed in installments or deducted in a lump, no refund or credit can be allowed until the entire amount of tax due has been paid. In either case the amount of the tax paid in the first installment—i. e., $49,050.66—would have exceeded the correct amount of the tax, and only the excess could be refunded or credited to the taxpayer. It is clear, therefore, that, whether interest runs from the date of payment or six months after claim for refund is filed, no interest can run on any overpayment until after the amount of tax due has been paid. Or, more concisely stated, there is no "overpayment" until after all taxes due have been paid. Therefore, even if interest on the refund runs from date of payment it must be computed on $49,050.66 (amount of first installment paid), less $13,663.89 (correct amount of tax due), from March 15, 1921, and on $49,050.66 (amount of second installment paid) from June 15, 1921.

To repeat the direction of the statute, the "excess so paid shall be credited against the subsequent installments." As a consequence of this provision

of law the correct amount of tax due would have to be credited against the amount of the first installment paid, $49,050.66, before any of the amount so paid in excess of the amount due could be credited or refunded.

If this Court determines that no specific protest has been established, then none of the claims based upon the right to additional interest because of such a protest are recoverable.

III

Appellants were not entitled to refund of more than the amount actually paid by them. They can not recover, therefore, the sum of $767.79 discount upon the excess-profits tax for 1917

The amount of the excess-profits tax assessed amounted to $108,140.15. Claimants paid $107,372.36 on March 21, 1918, taking advantage of the discount allowed by Section 1009 of the Act of 1917, thereby satisfying the entire amount of the assessment. The latter amount has been refunded and the claim now made is that they were entitled to the difference amounting to $767.79. The latter amount was a deduction allowed for advance payment. The amount of this discount, however, was not paid within the meaning of Sections 250(b) and 252 of the Revenue Act of 1921, hereinbefore set forth, and can not be a proper subject of refund by the Commissioner of Internal Revenue.

To pay means to transfer or deliver money or other agreed medium of exchange from the debtor

to the creditor, and while the word " payment " is often used merely to signify satisfaction or discharge of an obligation, as by set-off or the like, that is a secondary and somewhat loose use of the term inapplicable in a suit to recover back what was paid.

Under Sections 250 (b), 252, and 1315 of the Revenue Act of 1921, the taxpayer is entitled to recover back only amounts actually paid in excess of the amount which should have been paid. Had Congress intended to authorize the refunding of amounts allowed as discounts, it would have said so in adequate language, and instead of the phrase, " paid in excess of that properly due," used in Section 252 of the Revenue Act of 1921, it would have expressed its intention by the use of a phrase such as " paid or satisfied in excess of that properly due."

Under the authority specifically granted in Section 1009 of the Revenue Act of 1917, to prescribe rules and regulations relative to the allowance of discounts for advance payment of tax, the Commissioner, with the approval of the Secretary of the Treasury, issued the following regulation:

> If the advance payment in whole is made at the time of filing the return, and if upon the examination of such return in this office, it is found that the payment was in excess of the amount required, together with the interest thereon to satisfy the tax actually due, the taxpayer will be entitled to the refund of the amount of excess payment (but not

> the interest thereon) by making claim for same on Form 46. (Treasury Decision, Internal Revenue, 2622, vol. 19, pages 414, 416.)

There is absolutely no basis for the contention of the claimants that they are entitled to recover from the United States an amount of money in excess of the amount actually paid by them. The petition alleges that:

> The claimants having paid and satisfied in full the original assessment of $108,140.15, and having been held not subject to any tax whatsoever, were entitled to the refund of its full amount and the unpaid balance of $767.79. * * *

The allegation that they are " entitled to the *refund* of * * * the unpaid balance of $767.79 " is an anomaly, and is sufficient in itself to show how unreasonable is their claim. The word " refund " means " to pay back, by the party who has received it to the party who has paid it, money which ought not to have been paid." (Bouv. Law Dic.) The word " refund " presupposes payment of an amount of money, and as there has been no actual payment of the $767.79 it follows that there could be no subsequent refund or repayment thereof. It is therefore clear that no refund or other payment of the $767.79 claimed is due from the United States to these claimants.

Claimants seek to rely upon the ruling of the Commissioner published in Internal Revenue

Cumulative Bulletin Vol. III, No. 1, page 343, the syllabus of which reads as follows:

> The taxpayer was allowed, under the provisions of section 1009 of the Revenue Act of 1917, a discount for the payment in advance of the amount shown due on the return for the year 1917 and the net amount was assessed. The correct tax liability was determined in 1921 to be in excess of this amount. In computing the amount of an overassessment the net amount assessed in 1917 should not be used, the taxpayer being entitled to the discount.

This ruling, however, can furnish no support for claimants' position because it does not relate to refunds but merely to the adjustment of assessments. Under it, for example, if $100,000 is the amount of the assessment, and the amount of discount for advance payment is $3,000, and it is found that said amount is improperly assessed, the amount to be abated would be the entire amount of the assessment, regardless of the amount of the discount. The situation is quite different where a refund is involved. In case of refund the amount refunded cannot under any circumstances be more than the amount paid.

With reference to their claim for interest on the amount of the discount, it may be conceded that if claimants are entitled to the amount of the discount, which they did not pay, they are also entitled to

interest on the amount of said discount, which cannot be refunded because never paid, all of which goes to show the absurdity of their claim.

IV

This action is not maintainable, because the appellants have accepted without objection the refunds and interest allowed by the Commissioner

The Court of Claims in dismissing the petition of appellants rested its decision on *Stewart* v. *Barnes,* 153 U. S. 456. That was an action for the recovery of interest alleged to be due because of the retention of money improperly collected as taxes from the taxpayer. The sole question was whether such an action could be maintained in view of the fact that the principal had been received by him. This Court in holding that the taxpayer who had accepted a refund of the taxes illegally collected, could not maintain an independent action thereon for interest, said in this connection, at page 462:

> Where money is retained by one man against the declared will of another who is entitled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of the money, to allow interest as compensation to the creditors for such loss. Interest in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt. The right of action is the right to compel the payment of the money which is

being retained. When he who has this right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost.

* * * the rule seems to be founded in reason, and hardly to need the support of precedent (p. 463).

* * * * *

* * * the action is not one sounding in damages, but that the damages, or interest, is demanded simply in respect of the detention of the principal (p. 464).

We think the court below was correct in applying that rule to the instant case.

These similarities exist between the *Stewart case* and the one at bar:

(1) There has been an illegal exaction of taxes. (2) The taxes wrongfully collected and retained have been returned to the taxpayer. (3) The action here is in the main for interest. Interest is claimed after the receipt of the principal without objection.

There are these apparent distinctions between the two cases:

(1) Here the appellants have received the principal, plus interest which was due as determined by the Treasury Department under its consistent

interpretation of Section 1324(a). Whereas in the *Stewart case* the taxpayer received no interest.

(2) In the *Stewart case* the action was brought against the collector, while here it is against the United States.

(3) The right to interest here is predicated upon Section 1324 (a), Revenue Act of 1921, whereas in the *Stewart case* it was based upon general principles of law which allowed the recovery of interest, as damages for the wrongful retention of money.

Appellants contend that the case at bar falls within the exception noticed by this Court in the *Stewart case, supra* (pages 463–4), namely, that the demand for interest in the nature of damages here is the very ground of the action. In other words that Section 1324 (a) confers a right to interest independent of the right to the principal, and in no way incidental thereto, so that the receipt of the principal without objection does not extinguish the right to the interest. To put it in another way: The contention of appellants is that the interest allowed by Section 1324(a) is a part of the principal debt; that the payment made and received by them is but a partial satisfaction of the total debt due, and is not a full satisfaction of the whole debt, (*National Bank, Etc.,* v. *Mechanics Nat. Bank,* 94 U. S. 437); and that two separate and distinct causes of action will lie, one for the interest, the other for the principal.

It is well settled that in the absence of an express statute, the United States is not liable for interest on claims against it unless it has stipulated to pay interest. This Court in discussing that principle in *United States* v. *Sherman,* 98 U. S. 565, 567–568, said:

> * * * whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes.

This favored position of the Government in this respect has also been declared to be demanded by public policy. *United States* v. *Verdier,* 164 U. S. 213, 218–219.

On the other hand, if a suit was brought against a collector for the refund of taxes, it was considered as a private action, and not a claim against the Government until a certificate of probable cause under R. S. 989 had been issued, at which time the Government assumed definite liability of the collector. The situation, therefore, was this: That in a suit against a collector for the recovery of taxes illegally exacted, the claimant was entitled to interest in the event of recovery. *Erskine* v. *Van Arsdale,* 15 Wall. 75; *Redfield* v. *Bartles,* 139 U. S. 694; *National Volunteer Home* v. *Parrish,* 229 U. S. 494, 496.

Congress has recognized this distinction and has for years refused to allow interest, even though hardship may have resulted therefrom. *United States* v. *North American Co.*, 253 U. S. 330, 336. However, by Section 1324 (a) Congress has changed its policy to the extent of allowing interest to a limited extent upon refund of taxes wrongfully collected.

If an action is brought for the recovery of taxes, then Section 1324 (b) (42 Stat. 316) applies. This amends Section 177, Judicial Code, to read:

> No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws.

This also was a change of policy in that interest *may* now be allowed by any court whether the action be against the United States or a collector. It does not, however, prescribe any rates or conditions such as contained in Section 1324 (a). In effect, therefore, subdivision (b) places the United States upon the same plane as a collector, in that

interest may be allowed in an action for the recovery of taxes wrongfully collected.

Interest, therefore, may now be allowed a taxpayer whether the refund is obtained through the medium of a claim filed with the Commissioner, or by resort to the courts.

When Section 1324(a) is viewed in the light of the foregoing considerations, it seems evident that it was intended merely to remove the legal impediment which public policy had thrown around the sovereign, and, apart from this, the statute does nothing more than fix the rates of interest upon claims for refunds allowed by the Commissioner. It does not have the force of creating independent rights upon which independent actions can be based for interest alone. The right to interest under the statute remains as before, not absolute, but as incident to and dependent upon the right to the principal. *New York Trust Co.* v. *Detroit T. & I. Railway Co.*, 251 Fed. 514, 518, and cases therein cited; *Ludington* v. *Miller*, 6 Jones & S. 478 (38 Supr. Ct. (N. Y.) 478); *Brady* v. *Mayor*, 14 App. Div. (N. Y.) 152; *Graveson* v. *Odd Fellows' Temple Co.*, 6 Ohio (S. & C. P.) Decisions 287; *Potomac Co.* v. *Union Bank*, Fed. Cas. No. 11,318; *Bidder* v. *Bridges* (1888) 37 Ch. D. 406. It does not abrogate the rule of law laid down in the *Stewart case*, and which the court below has applied to the case at bar, because appellants have received the principal, plus the interest which the Commissioner

determined upon his construction of the statute was due appellants, without objection.

The present action is plainly one to recover interest for money wrongfully retained. Substantially it is based upon the same theory as that advanced in the *Stewart case,* namely, for damages arising out of the wrongful exaction of taxes, and in such a case the Government is now precluded from asserting the sovereign immunity by the provisions of Section 1324(a). The fact that the statute fixes the rates of interest, will not alone convert an incidental right into an absolute one upon which an action can be maintained, because the basis of the suit remains essentially the same—for the wrongful detention of money, and interest is allowed simply as compensation therefor. (*New York Trust Co.* v. *Detroit T. & I. Ry. Co.,* 251 Fed. 514.)

Appellants further argue that they can maintain this action even though they have accepted the principal, plus the interest determined by the Commissioner upon his construction of Section 1324-(a), for the reason that they have received and accepted but a part of that which is due. Upon this proposition they rely upon *Crane* v. *Craig,* 230 N. Y. 452, and *Woodward-Brown R. Co.* v. *New York,* 203 App. Div. (N. Y.) 625. Those cases are clearly distinguishable from the one at bar, for the reason that the additional interest recovered constituted a part of just compensation for the taking of private property for a public use. The

right to maintain an action for additional interest in cases of that kind is not made to depend upon a contract, express or implied. A promise to pay is not even necessary. Such interest is not allowed by virtue of a statute, but as constituting a part of the just compensation safeguarded by the Constitution. (*Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304, 305, 306.) The ascertainment of just compensation is a judicial function. (*United States* v. *New River Collieries,* 262 U. S. 341, 343.)

In *Pacific Railroad* v. *United States,* 158 U. S. 118, the plaintiff in a prior action had recovered a judgment in the Court of Claims, and on an appeal by both parties, this Court reversed the judgment with directions to increase it to the full amount of the petitioner's claim. This final judgment for the larger amount was paid under an Act of Congress appropriating two sums which equalled the amount of the second judgment. This Act stated that the payments were "to be in full satisfaction of the judgment." The claimant accepted the money appropriated, and then brought action for the interest on both judgments from time of their rendition to the time of payment, alleging the interest to be due, and relying solely on the provisions of Section 1090 of the Revised Statutes, which allowed interest on judgments at the rate of five per centum from the date of the presentation of the claim to the Secretary of the Treasury. The Court of

Claims dismissed the action, and this Court affirmed the decision, applying the principles announced in *Stewart* v. *Barnes, supra,* namely, that the acceptance of the principal without objection, extinguished the right to sue for interest.

We think the *Pacific case* is in point, notwithstanding the fact that the receipt of the principal and the interest by appellants was not done pursuant to an appropriation statute which provided that the amount received should be a full and complete settlement.

In that case as in the one at bar a statute allowed interest, and the right thereto, if any existed was just as perfect in the *Pacific case* as in the instant one. This Court denied the right to recover in the former; it should do so in the latter. There is plainly no distinction in principle between the two cases.

It is to be observed that appellants, at pages 21–22 of their brief, attempt to raise the question that they have not "accepted" the principal of the refunds with the interest allowed by the Commissioner, and argue that that is a matter which the United States was bound to show by an affirmative defense. In this connection it is believed sufficient to point to the fact that affirmative defenses by the United States are not essential in litigation in the Court of Claims.

The Court of Claims is not bound by special rules of pleading. The main pur-

pose is to arrive at and adjudicate the justice of alleged claims against the United States. (*District of Columbia* v. *Barnes,* 197 U. S. 146, 154. See also *Little* v. *District of Columbia,* 19 Ct. Cls. 323, 330.)

In *Bidwell* v. *Preston,* 160 Fed. 653, the Government had repaid the principal amount of custom duties wrongfully collected from the claimant, and at the time of payment, he expressly claimed he was entitled to interest on the refund. An action was then brought by him to recover the interest as a balance due, the petitioner claiming the right to apply the payment first to interest. The Circuit Court of Appeals (Second Circuit) denied such a right, resting its decision on *Stewart* v. *Barnes, supra,* and *Thomas* v. *Railway,* 81 Fed. 911. Compare *Dayton Brass Castings Co.* v. *Gilligan,* 267 Fed. 872, 880, affirmed in 277 Fed. 227 (*certiorari* denied 258 U. S. 619); *Cuba Railroad Co.* v. *Edwards,* 298 Fed. 664.

Conceding, *arguendo,* that Section 1324(a) makes the interest allowable an integral part of the debt, this action cannot be maintained because the allowance of the refunds plus the interest, which has been received without objection by appellees, constitutes an award which is conclusive and binding upon both the appellants and the United States. Therefore, acceptance thereof constitutes the settlement of an account and amounts to nothing less than an accord and satisfaction. (Compare *St. Louis, B. & M. Ry. Co.* v. *United States,* 268 U. S. 169.)

In *United States* v. *Kaufman,* 96 U. S. 567, the claimant brought an action in the Court of Claims to obtain a judgment based upon a claim for refund of taxes allowed by the Commissioner. It was insisted by the Government that the finding of an allowance by the Commissioner was not enough, but that the court should have gone behind the allowance and found the facts in respect to the original claim. In holding that the allowance made by the Commissioner is conclusive unless impeached, Mr. Chief Justice Waite, at p. 570, says:

> It is now insisted that the finding of an allowance by the commissioner is not enough, and that the court should have gone behind the allowance, and found the facts in respect to the original claim. Such, we think, is not the law. To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the government, by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted. Until so submitted, and until so adjudicated, there is not even a prima facie liability of the government; but when submitted, and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefore, the court found the adjudication against the government, without impeachment, the liability to pay was established.

> We do not decide that in the Court of Claims the adjudication of the commissioner may not be impeached, but we do decide that, until impeached, it is binding, and that the affirmative of the impeachment is upon the government.
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> * * * Here, an application for payment was made to a proper officer of the department. He performed his duty by certifying his allowance and sending it forward in the regular course of business, through the department, for payment. The adjustment was complete, and, for all that appears, nothing more was necessary for the claimant to do except to call at the treasury and get his money.

The same principles announced in the *Kaufman case* apply with equal force to the case at bar because it is the settlement of an unliquidated claim, and when the award has been made by the Commissioner by the allowance of the claim for refund, plus the interest thereon which under his construction of the law he has added to the sum allowed, all of which was paid to the taxpayer, and accepted by him without protest or objection the transaction has then become closed. Compare *Baird* v. *United States,* 96 U. S. 430, 431–432. By Section 1313 of the Revenue Act of 1921, Act of November 23, 1921, ch. 136, 42 stat., 227, 313–314, it is provided:

> That in the absence of fraud or mistake in mathematical calculation, the findings of facts in and the decision of the Commis-

> sioner upon (or in case the Secretary is authorized to approve the same, then after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by any other administrative officer, employee, or agent of the United States.

The effect of Section 1313 is to give finality, so far as the Government is concerned, to an award of the Commissioner, except that it may be impeached for fraud or mistake in mathematical calculation.

When the taxpayer has received and accepted without objection the amount refunded, it becomes final as to him; the account is closed. The award is so complete that when the claim for refund has been allowed and payment thereon made, it cannot thereafter be recovered back. (*Graves* v. *County First National Bank of Mayfield,* 108 Ky., 194; *Adair County* v. *Johnston,* 160 Iowa, 683; *Cooley on Taxation* (4th ed.), Section 1259; *People ex rel Erie R. R. Co.* v. *Supervisors,* 193 N. Y. 127.)

CONCLUSION

The judgment of the Court of Claims should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

RANDOLPH S. COLLINS,
Attorney.

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